

The Honorable Ricardo S. Martinez

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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TANA IHRIG and MARK IHRIG,

Plaintiffs,

v.

WASHINGTON MUTUAL BANK, formerly  
known as Provident National Bank; NEW  
AMERICAN CAPITAL, INC., a Delaware  
corporation, formerly known as Provident  
Financial Corporation; RICHARD J.  
BOUDREAU & ASSOCIATES, LLC, a  
Massachusetts limited liability company;  
LVNV FUNDING, LLC, a Delaware limited  
liability company; PHILLIPS & COHEN  
ASSOCIATES, LTD, a New Jersey  
corporation; and RESURGENT CAPITAL  
SERVICES, LP, a Delaware Limited  
Partnership,

Defendants.

No. CV6 512RSM

NOTICE OF MOTION AND  
MOTION TO DISMISS PLAINTIFF'S  
COMPLAINT PURSUANT TO  
FEDERAL RULE OF CIVIL  
PROCEDURE 12(b)(6), FAILURE  
TO STATE A CLAIM UPON WHICH  
RELIEF CAN BE BASED, BY  
WASHINGTON MUTUAL BANK  
AND SUPPORTING  
MEMORANDUM AND POINTS OF  
AUTHORITY

NOTE ON MOTION CALENDAR:  
July 21, 2006

**TO PLAINTIFF AND TO THEIR ATTORNEY OF RECORD:**

PLEASE TAKE NOTICE that on July 21, 2006, or as soon thereafter as the  
matter may be heard in the above-entitled Court, Washington Mutual Bank,  
successor in interest to Provident National Bank ("WAMU"), and New America

MEMORANDUM AND POINTS  
OF AUTHORITY - 1

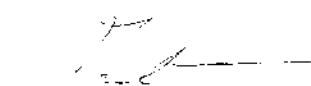
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1 Capital, Inc. successor in interest to Providian Financial Corporation ("PFC"), by and  
2 through their attorney, Lance Olsen of Routh Crabtree Olsen P.S., will move the  
3 Court to dismiss Plaintiffs' complaint pursuant to F.R.C.P. rule 12(b)(6) on the  
4 grounds that Plaintiff has failed to state a claim upon which relief can be based.

5 This Motion is based upon the accompanying Memorandum of Points and  
6 Authorities and the pleadings on file in this case.

7  
8 Dated: June 27, 2006

ROUTH CRABTREE OLSEN, P.S.

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11 Lance E. Olsen, WSBA #25130  
12 Attorneys for Defendants  
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MEMORANDUM AND POINTS OF AUTHORITY

I. INTRODUCTION

COME NOW Defendants Washington Mutual Bank successor in interest to Providian National Bank ("WAMU"), and New America Capital, Inc. successor in interest to Providian Financial Corporation ("PFC"), by and through their attorney, Lance Olsen of Routh Crabtree Olsen P.S., and move this Court to dismiss Plaintiff's Complaint for failure to state a claim upon which relief can be granted.

II. MATERIAL FACTS

In April of 2001, Providian National Bank issued a credit card to Tana L. Ihrig ("Plaintiff") bearing account number 4559-5425-0046-0215. Affidavit of Jill Pulliam at ¶ 3.

In September of 2004, Providian National Bank closed the credit card account thus prohibiting any further borrower charges or advances to the account. Affidavit of Jill Pulliam at ¶ 4.

In November of 2004, Providian sold all rights and interests in the account to an unrelated third party. Under the terms of sale, Providian retained no rights to collect payments and rights to any dollars collected on the account after the date of sale. Affidavit of Jill Pulliam at ¶ 5.

All activities of which Plaintiff complains began after Providian had sold all rights and interest to Plaintiff's account and after such time that Providian had any influence or control over activity on the account, including the choice of agent for collection. Complaint at ¶¶ 11 – 22.

### III. AUTHORITY AND ARGUMENT

#### STANDARDS GOVERNING A MOTION TO DISMISS

The action should be dismissed if, accepting the plaintiff's allegations as true, the court concludes that no set of facts consistent with the complaint could be proved which would entitle the plaintiff to relief against the moving party.

Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9<sup>th</sup> Cir. 2001) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Neither the defendants nor the court are bound by legal conclusions set forth in the complaint as allegations of fact. Papsan v. Allain, 478 U.S. 265, 285, 105 S.Ct. 2932, 2944, 92 L. Ed. 2d 209 (1986). In addition, while doubts should be construed in favor of the pleader, a liberal interpretation cannot be used to provide essential elements of a claim which are lacking in the complaint itself. Ivey v. Bd. Of Regents of the University of Alaska 673 F.2d 266, 268 (9<sup>th</sup> Cir. 1982). Judicial notice may be taken of matters within the public record. Notice of this type will not convert the motion from one to dismiss to one for summary judgment. 5A Wright & Miller, Federal Practice and Procedure, §1364 at 140-41 (2004); Kramer v. Time Warner, Inc., 937 F.2d 767,773 (2d Cir. 1991). Moreover, "if facts that are alleged to be true in a complaint are contradicted by facts that can be judicially noticed, the contradicted facts in the complaint are not to be deemed as true upon consideration of the motion to dismiss." 5A Wright & Miller, Federal Practice and Procedure §1364 (2004). An affidavit or declaration may accompany a motion to dismiss. North Star International v. Arizona Corporation Commission, 720 F.2d 578, 581-82 (9<sup>th</sup> Cir. 1983). The Complaint's

1 first, second, fourth and fifth claims for relief, as well as the suggestion of class relief,  
 2 all relate to conduct of defendants other than the moving party. Complaint, at Prayer  
 3 ¶¶ 11-22.

4 Plaintiff, acknowledging that WAMU and PFC in no way directly violated any  
 5 law, argues in the complaint that each should be vicariously liable for the actions of  
 6 others. This claim, along with all other causes of action, should be dismissed  
 7 outright.  
 8

9  
 10 **A. DEFENDANTS ARE NOT DEBT COLLECTORS AS DEFINED BY  
 THE FAIR DEBT COLLECTION PRACTICES ACT ("FDCPA").**

11 Under 11 U.S.C. § 1692(a)(6), the term "debt collector" means any person ...  
 12 who regularly collects or attempts to collect, directly or indirectly, debts owed or  
 13 asserted to be owed or due another. It is clear that the primary purpose of the  
 14 FDCPA is the regulation of third party debt collectors, and not the original creditors  
 15 of a debtor. United States v. Central Adjustment Bureau, 823 F.2d 880, 881 (5<sup>th</sup> Cir.  
 16 1987). Consequently, creditors collecting their own debts are exempt from  
 17 coverage. Dau v. Storm Lake Production Credit Association 626 F. Supp. 862, 863-  
 18 64 (N.D. Iowa 1985).  
 19

20 Therefore, even if Defendants had a debt, and even if they were engaged in  
 21 the collection of that debt, they would not be liable under the Fair Debt Collection  
 22 Practices Act because the only relevant debt is debt that Provident National Bank  
 23 originated. Therefore, all causes of action alleged against Defendants under the  
 24 FDCPA must be dismissed.  
 25  
 26

**B. DEFENDANTS ARE NOT ENGAGED IN COLLECTING THE DEBTS  
OWED OR DUE ANOTHER AND ARE THEREFORE NOT SUBJECT TO  
THE PROVISIONS OF RCW 19.16 et. seq.**

Under RCW 19.16, the term "Collection Agency" means any person directly or indirectly engaged in soliciting claims for collection, or collecting or attempting to collect claims owed or due or asserted to be owed or due another person.

PNB originated the debt in question and is not alleged to have engaged in any conduct to collect debts owed or asserted owed to another. Therefore, even if it had not sold that debt and even if it had retained any right or interest in the debt, it could not be liable under the provisions of RCW 19.16 et. seq. Therefore, all causes of action against Defendants under RCW 19.16 must be dismissed.

**C. DEFENDANTS ARE NOT LIABLE UNDER THE FAIR CREDIT  
REPORTING ACT BECAUSE DEFENDANTS REPORTED THE  
ACCOUNT AS SOLD AND PLAINTIFF FAILS TO ALLEGE ANY  
NOTIFICATION OF DISPUTE.**

Plaintiff's only allegation concerning the Fair Credit Reporting Act is listed in paragraph 25(l) wherein it is asserted that by reporting their claims to credit reporting agencies, or by reporting their claims and failing or refusing to note said claims as being disputed, or by refusing to remove their disputed claims from credit reporting agency records the Defendants violated the FDCPA and the Fair Credit Reporting Act (FCRA).

Under 15 U.S.C. § 1681(i), if the completeness or accuracy of any item of information contained in a consumer's file at a consumer reporting agency is disputed by the consumer and the consumer notifies the agency directly, or indirectly through a reseller, of such dispute, the agency shall, free of charge, conduct a

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1 reasonable reinvestigation to determine whether the disputed information is  
 2 inaccurate and record the current status of the disputed information, or delete the  
 3 item from the file in accordance with paragraph (5), before the end of the 30-day  
 4 period beginning on the date on which the agency receives the notice of the dispute  
 5 from the consumer or reseller. Plaintiff makes no allegation that at any time notice  
 6 of the dispute was delivered to any of the reporting agencies.  
 7

8 Under 15 U.S.C. § 1681s-2, furnishers of information have no duty to  
 9 investigate the existence of inaccurate information, correct information alleged to be  
 10 inaccurate or note an account has been disputed until and unless the consumer first  
 11 notifies the furnisher, at the address specified for such notices, of the dispute or the  
 12 furnisher receives a timely notice of dispute from a credit reporting agency. In the  
 13 case at bar, Plaintiff does not allege that it provided such notice directly to the  
 14 Defendants at any address or to any credit reporting agency. Therefore, there can  
 15 be no claim of liability under the FCRA and all such causes of action should be  
 16 dismissed.  
 17

18  
 19 **D. DEFENDANTS WAMU & PFC DID NOT SELECT ANY DEFENDANT**  
 20 **DESCRIBED IN THE COMPLAINT, DID NOT CONTROL ANY**  
 21 **DEFENDANT DESCRIBED IN THE COMPLAINT AND HAD NO**  
 22 **RELATIONSHIP WITH ANY DEFENDANT NAMED IN THE**  
**COMPLAINT.**

23 Vicarious liability is the imputation of liability upon one person for the actions  
 24 of another. A basic tenet of vicarious liability is a master-servant relationship  
 25 between the defendant and the alleged tortfeasor. For example, an employee, while  
 26 in the scope of his employment for an employer, drives a truck hitting and injuring a

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1 person crossing the street may be vicariously liable under the doctrine of *respondeat*  
2 *superior*. The doctrine of *respondeat superior* can probably be best explained as an  
3 outgrowth of the sentiment that it would be unjust to permit one to gain from the  
4 intelligent cooperation of another without being responsible for the mistakes, the  
5 errors of judgment and the frailties of those working under his direction and for his  
6 benefit." Petro-Tech, Inc. v. Western Co. of North America, 824 F.2d 1349, 1358 (3d  
7 Cir. 1987) *Respondeat superior* liability also provides employers and principals with  
8 an incentive to monitor employees and agents to deter wrongful conduct.  
9

10 In the case at bar, Plaintiff has failed to establish any relationship between  
11 Defendants and the parties alleged to have engaged in wrongful conduct. Further,  
12 Plaintiff has failed to allege how Defendants benefited from the alleged misconduct  
13 or could have in any way controlled any party alleged to have engaged in  
14 misconduct. Put simply, because there lacks any agency or similar relationship  
15 between Defendants and the parties alleged to have engaged in misconduct, there  
16 can be no vicarious liability.  
17

18 Under the theory put forward by Plaintiff, not only is the owner of the truck in  
19 the above example liable to the injured party, but so is the dealership that sold the  
20 truck. Defendants are unaware of any case, law or theory that would support such a  
21 cause of action.  
22

23 Once Providian sold the account to an unrelated third party, it lost all control  
24 over the account and ceased to participate in or benefit from collection activity.  
25 Therefore, once Providian sold the account, it ceased to be liable for conduct  
26 concerning the account initiated after the date of sale.



1  
2  
3 **IV. CONCLUSION**

4 Defendants sold Plaintiff's account to a third party before the account had  
5 been placed with any other defendant for collection. Defendants did not benefit from  
6 or control the activity of any other defendant and thus cannot be liable for the  
7 misconduct alleged of other defendants. Therefore, Defendants respectfully request  
8 the Court dismiss all causes of action against them in their entirety.  
9

10 DATED: June 21, 2006

11 Respectfully submitted,

12 **ROUTH CRABTREE OLSEN, P.S.**

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15 BY: 

16 **LANCE E. OLSEN, WSBA #25130**  
17 Attorneys for Defendants  
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**Declaration of Service**

The undersigned makes the following declaration:

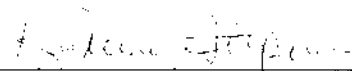
1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. That on June 27, 2006, I caused a copy of the NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT BY WASHINGTON MUTUAL BANK, MEMORANDUM OF LAW IN SUPPORT; and PROPOSED ORDER GRANTING DEFENDANT WASHINGTON MUTUAL BANK'S MOTION, to be served to the following in the manner noted below:

James J Sullivan Law Offices of James J Sullivan 11110 NE 38 <sup>th</sup> PL Bellevue, WA. 98004 Attorney for Plaintiffs	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> ECF Electronic Notice
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed this 27<sup>th</sup> day of June, 2006.

  
\_\_\_\_\_  
Kristine Stephan, Paralegal

DECLARATION OF SERVICE

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